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IN THE

Supreme Court of the United States

Case No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioners,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS, and RICHARD T. CONWAY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
A. United States District Court for the Northern District of Ohio	1
B. United States Court of Appeals for the Sixth Circuit	2
Question Presented	2
Statement of the Case	2
Argument	3
Conclusion	6

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Opinions Below

A. United States District Court for the Northern District of Ohio.

No opinion was filed by the District Court. The record clearly shows that the Trial Court found as a matter of law that there was no evidence of malice "within the legal definition of that term." However, notwithstanding such express finding, defendants' motion to dismiss the case, as to Petitioners, was denied by the Trial Court and the case was submitted to the jury. Judgment was thereafter entered on the jury verdicts for $45,000.00 and $15,000.00 in favor of the Petitioners. Defendants' timely motion for a new trial and for judgment notwithstanding the verdict was denied by the Trial Court.

B. *United States Court of Appeals for the Sixth Circuit.*

In an unanimous opinion, filed September 10, 1973, the Court specifically ruled that "Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth, the District Court should have granted the motion for a directed verdict as to all defendants" (Opinion, p. 8). Accordingly, the Court of Appeals reversed the judgments and remanded the case to the District Court for entry of judgment for the defendants.

Question Presented

Should certiorari be granted in an action for invasion of privacy based upon the publication of an article concerning a matter of public interest where the lower Courts correctly applied the constitutional standards in accordance with the controlling cases of this Court and where the lower Courts found no evidence of known falsity or reckless disregard of the truth?

Statement of the Case

On December 14, 1967, the Silver Bridge connecting Ohio with West Virginia collapsed into the Ohio River. This tragedy resulted in the loss of 44 lives and was the subject of widespread public interest and concern (Pltf. Ex. 1). Among those killed were Mel Cantrell and Cecil Counts, passengers in a car driven by Margaret Cantrell (A. 15).[1] The following day, The Plain Dealer sent reporter Eszterhas to cover the story. During the course of this assignment, Eszterhas met Margaret Cantrell—one of the 18 survivors of the tragedy—and attended the funeral of her deceased husband, Mel Cantrell (Deft. Ex. 2). Eszterhas interviewed the survivors of the bridge tragedy

[1] Reference to Pages in the Appendix.

and members of the family of those who were killed (Pltf. Ex. 1). As a result of this on-the-scene investigation, Eszterhas wrote an article published in The Plain Dealer for which he was awarded an annual prize presented by the Press Club of Cleveland (A. 67-68). He also shared in an award given by the Ohio Associated Press Society of Columbus, Ohio, for the coverage of this story (A. 69).[2]

On a weekend in May, 1968—five months later—Eszterhas returned to the scene of the tragedy at Point Pleasant, West Virginia, accompanied by a photographer, Richard Conway, to ascertain the effects of the Silver Bridge tragedy on those directly involved. They went to the Cantrell family (A. 45, 62, 75). While at the Cantrell home Eszterhas interviewed, and Conway photographed (A. 78), those members of the family who were present. The impressions of this interview and the photographs taken were published in the August 4, 1968 issue of The Plain Dealer (Pltf. Ex. 1).

ARGUMENT

This Court has firmly established as the constitutional standard to be applied in First Amendment cases, that where there is a publication concerning a matter of public interest, Petitioners must prove malice as defined.

Petitioners have not shown any special or important reason for this Court to grant certiorari. The decision below is not in conflict with the decisions of other Courts of Appeals in this area. There has been no departure from the accepted and usual course of judicial proceedings. The matter in issue is not novel to this Court and the decision below is harmonious with the applicable decisions of this Court.

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[2] Eszterhas received an award in 1970 from the Ohio Associated Press Society for his exclusive story in November, 1969, on the My Lai massacre (A. 69).

This Court has firmly established that a plaintiff, in a First Amendment action, must prove by clear and convincing evidence that the article complained of, or statement made, was published with knowledge that it was false or with reckless disregard of whether it was false or not. This requirement of "clear and convincing proof" has been applied to a wide range of subjects within the public interest doctrine[3], including the instant case. This *New York Times*

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[3] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1963); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964)—comment of a local District Attorney concerning local judiciary; *Henry* v. *Collins*, 380 U.S. 356 (1965)—comments by defendant that his arrest was a result of a "diabolical plot" by County Attorney and City Police Chief; *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966)—charges by union of wrongdoing by official of Pinkerton's National Detective Agency during a union-organizing campaign; *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966)—comments that a supervisor of a New Hampshire ski resort had improperly performed his duties; *Time* v. *Hill*, 385 U.S. 374 (1967)—a human interest story in connection with the opening on Broadway of a new play adapted from a book based on a crime involving plaintiffs, as victims, several years earlier; *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)—a claim that the football coach of the University of Georgia revealed certain of his team's plays to an opponent prior to their game; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967)—charges made during an election campaign; *St. Amant* v. *Thompson*, 390 U.S. 727 (1968)—charges made by a candidate for public office; *Pickering* v. *Board of Education*, 391 U.S. 563 (1968)—improper dismissal of a teacher for writing a letter to the editor of a newspaper criticizing the Board of Education; *Greenbelt Coop. Pub. Asso.* v. *Bresler*, 398 U.S. 6 (1970)—use of the term "blackmail" in connection with the presentation of a local real estate developer at a City Council meeting; *Patriot Co.* v. *Roy*, 401 U.S. 265 (1971)—referring to a candidate for the U.S. Senate as "a former small-time bootlegger" with the Court noting no distinction between the evidence concerning the private life and public life of such candidate; *Time* v. *Pape*, 401 U.S. 279 (1971)—insufficient evidence of falsification to create a jury issue or sustain a jury finding of actual malice in a matter involving a Chicago policeman: *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971)—erroneous identification of a candidate for County Tax Assessor as one who had been charged in Federal Court with perjury in a civil rights suit: *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971)—identification of a private person as a pornographer.

doctrine has been extended to all publications involving matters of public interest in furtherance of the First Amendment right of the public to be kept informed. *Time, Inc.* v. *Hill, Rosenbloom* v. *Metromedia,* both *supra.*

The Trial Court found "that there had been no evidence to support the charge that the invasion of privacy, if in fact an invasion of privacy incurred, was done maliciously within the legal definition of that term" (A. 60). The Court of Appeals in referring to the Trial Court's finding of no malice stated that ". . . the District Court should have granted the motion for a directed verdict as to all defendants." (Opinion, p. 8.)

Petitioners fail to show any constitutional basis for granting their petition for certiorari. Petitioners have apparently misconstrued the questions presented and the theory upon which this case was tried below—invasion of privacy by publication under the First Amendment—with questions concerning physical trespass, criminal wire tap, the right to trial by jury and unreasonable search and seizure. These questions are not present in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that Plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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